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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 859

VIRGINIA CORDREY,

Appellant,

vs.

DR. LEE JAMES CORDREY,

Appellee.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

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No. _____

VIRGINIA CORDREY,

Appellant,

vs.

DR. LEE JAMES CORDREY,

Appellee.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment and/or order (I 14, App. A)(unreported) of the Supreme Court of Florida, Tallahassee, Florida, dated and entered 23 September, 1968, denying appellant's petition for rehearing. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

The appellant was the plaintiff in the trial court. The appellee was the defendant in the trial court. To avoid confusion the appellant will be hereafter referred to as the "wife" and the appellee will be hereafter referred to as the "husband".

The following symbols will be used:

"R." for the page or pages of an instrument as denoted in the master "Index to Record on Appeal" which is the principal record on appeal and was prepared by the Clerk of the District Court of Appeal, Second District.

"I." for the "Item" number of an instrument, as denoted in the "Index" prepared by the Clerk of the Supreme Court of Florida.

"P" for the actual page or pages of an instrument which was made a part of the record, as such instrument itself was numbered when it first became a part of the cumulative record on appeal.

"App." for the page or pages of the appendix appended to the within jurisdictional statement.

OPINIONS BELOW

The wife appeals from the judgment and/or order (I. 14, App. A) (unreported) of the Supreme Court of Florida, Tallahassee, Florida, the State of Florida's highest appellate court, dated and entered 23 September, 1968, which denied the wife's petition for rehearing. The next prior judgment and/or order (I. 11, App. B) (unreported) was also by the Supreme Court of Florida, Tallahassee, Florida, dated and entered 18 July, 1968. It dismissed the wife's appeal from the judgment and/or order (reported at 206 So.2d 234) of the District Court of Appeal of Florida, Second District, Lakeland, Florida, dated and entered January 17, 1968. Such dismissal was

without argument on the merits. The aforesaid judgment and/or order of the District Court of Appeal, Second District, Lakeland, Florida, affirmed in full the judgment and/or order (R. 487-497, App. C) (unreported) of the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County (Tampa) Florida.

JURISDICTION

This suit concerns the application of section 65.15 Florida Statutes (1965) volume 1, page 262, by Florida courts, to break a contract (R. 33-40, App. E) jointly executed between the husband and wife, and made and delivered to each spouse in the State of Ohio. The husband was also living in Ohio and engaged in medical practice there at such time. The wife claimed in the courts below that this contract was validly made pursuant to Ohio statutory and case law (infra at 10-13). The trial court agreed (R. 487-497, P. 9, App. 11) that the contract was fully valid, but only to the date suit was commenced. Both appellate courts did not disagree (I. 3, 11, 14; App. B, A). Contrary to the State of Florida law, the State of Ohio law considers contracts such as the contract sub judice to be inherently the same as non-domestic relations contracts (infra at 11-12), and thus generally unbreakable.

The breaking of this Ohio contract by Florida courts by applying a Florida statute is thus claimed to be repugnant to, or in contravention of, the Constitution of the United States. As a consequence there is drawn into question whether such Florida statute is invalid on its face because of conflict with the United States Constitution; or whether such Florida statute could be applied by Florida courts to break the contract sub judice without creating conflict with the United States Constitution.

The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U.S.C. §1257(2).

The aforesaid last judgment and/or order (I. 14, App. A) in this cause was dated and entered 23 September, 1968. There are no further proceedings pending in the courts below. Notice of appeal (I. 15) was filed in the Supreme Court of Florida 14 October, 1968.

The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the said judgment and/or order on direct appeal in this case:

Chicago G.W. R. R. v. Basham (1919) 249 U.S. 164, 166;

Aetna Life Insurance Company v. Dunken (1924) 266 U.S. 389, 393;

Home Insurance Company v. Dick (1930) 281 U.S. 397, 407;

Hughes v. Fetter, et al. (1951) 341 U.S. 609, 610;

Hartford Accident & Indemnity Company v. Delta and Pine Land Company (1934) 292 U.S. 143;

Broderick v. Rosner (1935) 294 U.S. 629, 639;

Alaska Packers Association v. Industrial Accident Commissioner of California (1935) 294 U.S. 532, 537;

Chicago and Alton Railroad Company v. Wiggins Ferry Company (1887) 119 U.S. 615, 623, 624;

Meyer v. City of Richmond (1898) 172 U.S. 82, 89;

Tumey v. State of Ohio (1927) 273 U.S. 510, 515;

Largent v. Texas (1943) 318 U.S. 418;

Lawrence v. State Tax Commissioner (1932) 286 U.S. 276, 282-283;

Dahnke-Walker Milling Company v. Bondurant (1921) 257 U.S. 282, 289;

Loeb v. Trustees of Columbia Township (1900) 179 U.S. 472, 476;

Carter v. State of Texas (1900) 177 U.S. 442, 447;

Mutual Life Insurance Company v. Alphonsine McGrew (1903) 188 U.S. 291, 308;

STATUTE INVOLVED

Section 65.15 Florida Statutes (1965) Vol. 1, page 262 (App. D) (History: §§1, 2, ch. 16780, 1935; CGL 1936 Supp. 4993(1); §16, ch. 67-254) was the statute employed by the trial court at the time of the dating and entry of its judgment and/or order (R. 487-497, App. C) to-wit: January 9, 1967. This statute has been amended in form, but not in substance, and has been transferred, and is now cited as section 61.14 Florida Statutes (1967) Vol. 1, page 253 or section 61.14 F.S.A.

QUESTION PRESENTED

The husband, while living in the State of Ohio, and in medical practice there, executed, in Ohio, a contract (R. 33-40, App. E) together with the wife. It provided, among many other provisions, for periodic future support payments for the wife until the husband died, or the wife died or remarried. The husband subsequently moved to the State of Florida and the wife immediately subsequent to the execution of the contract returned to her State of Pennsylvania apartment. Then the wife obtained a Pennsylvania divorce. The husband subsequently refused to pay further support monies to the wife, but at no time has alleged that the wife at any time has breached the contract (R. 23-25, 340-426). This forced the wife to come to Florida to enforce the contract, whereupon, the Florida courts below, upon request of the husband, applied a Florida statute and broke the contract. Thus, almost all of the wife's future contracted support monies were wiped out (approximately ninety per cent) (90%) (R. 487-497, P. 10, App. 12), as was approximately eighty thousand dollars ($80,000.00) of delinquent support monies (ibid).

The question presented is whether in these circumstances, as the contract was necessarily held to be a valid contract by the courts below for ten years prior to the time the contract was broken by such courts (R. 487-497, P. 9, App. 11-12) (trial court), (I. 3, 11, 14, App. A, B) (appellate courts), is such judicial contract breaking offensive or repugnant to or in violation of the following provisions of the United States Constitution?

U. S. Const. art. I, §10 — "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . "

U. S. Const. art IV, §1 — "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

U. S. Const. Amend. V — "No person shall . . . be deprived of . . . property without due process of law."

U. S. Const. Amend. XIV, §1 — "No State . . . shall deprive any person of . . . property without due process of law . . . "

STATEMENT OF THE CASE

1. Statement of the facts

The husband, while living in the State of Ohio, and in medical practice there, and while earning over sixty thousand dollars ($60,000.00) annually (R. 487-497, P. 7, App. 9), and while lawfully married to the wife (R. 487-497, P. 2, App. 3), entered into a separation agreement with the wife (R. 33-40, App. E) in Ohio, on 4 December, 1956. A copy of this contract was given to each spouse in Ohio at the time of the joint execution. The contract, among many other provisions, provided for certain support payments for the wife (essentially one-third of the husband's net income before income taxes). The husband continued to live in Ohio and practiced medicine there un-

til 1958, when he moved to the State of Florida. The husband has resided and has been in medical practice in Tampa, Florida, continuously from 1958 to the present time. The husband's net income before income taxes (and the wife's support monies therefore), when he first came to Florida, dropped far below his earnings when the contract was signed (R. 449-457, 569, P. 40). However, in recent years his gross income has been over three hundred thousand dollars yearly (R. 449-457, 487-497, P. 7, App. 9), or about two hundred thousand dollars net income yearly (R. 560, P. 31). The trial court found that much of this increase would be temporary (R. 487-497, P. 7, App. 9). The husband so testified (R. 564, P. 35)..

The wife secured a divorce from the husband in the State of Pennsylvania in 1959. Neither party to the present time has contested the validity of the Pennsylvania divorce decree to divorce the parties. The contract was not mentioned in any way in the aforesaid divorce proceedings, but the courts below have presumably found that this fact is, in effect, irrelevant and immaterial (R. 487-497, P. 9, App. 11) (trial court); I. 3, 11, 14, App. B, A) (appellate courts).

The husband failed to make the "final payment" to the wife payable for the year 1965 due January 31, 1966, pursuant to paragraph 2(c) of the contract (R. 33-40, App. 19). To secure the support contracted for, the wife was compelled to commence suit against the husband in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County (Tampa), State of Florida on March 11, 1966 (R. 1-10). The husband did not answer, alleging lack of funds to fulfill his contract, but countersued (R. 340-426) to break their contract pursuant

to then section 65.15 Florida Statutes (1965) Vol. 1, page 262 (App. D); now section 61.14 F.S.A. (slightly amended as to form only). The husband did not allege fraud, mistake or that the wife failed to comply with any of the many terms of the contract (R. 340-426). The trial court's judgment and/or order (R. 487-497, App. C) broke the contract by using then section 65.15 F.S.A. retroactively to wipe out much of the default by the husband in the monies then due the wife under their contract, approximately eighty thousand dollars ($80,000.00). Then section 65.15 F.S.A. was used prospectively to wipe out most of the support due the wife (about ninety per cent) (90%) under their contract. It is noteworthy that Ohio has no alimony modification statute. Also, that the courts below did not state that a reason for such "wipe out" was that the husband was financially unable to make his agreed payments.

The wife appealed to the District Court of Appeal of Florida, Second District, Lakeland, Florida, which fully affirmed the aforesaid trial court (reported at 206 So.2d 234 (1968). The wife appealed to the Supreme Court of Florida, Tallahassee, Florida, and the appeal was dismissed (I. 11, App. B). The wife petitioned the Supreme Court of Florida, Tallahassee, Florida for a rehearing which was denied (I. 14, App. A). This appeal ensued.

2. How the federal question was presented

Preliminarily, the wife submits that she properly raised the federal question in the lower courts as is demonstrated clearly by *Mutual Life Insurance Company v. Alphonsine McGrew* (1903) 188 U.S. 291, 308 (federal question is raised if briefs arguing a federal question have

been made part of the record). Further, a Federal Constitution question need not be pleaded, and may even be raised orally per *Loeb v. Trustees of Columbia Township* (1900) 179 U.S. 472, 476 (oral argument on demurrer). Finally, whether or not the constitutional issue was properly before the trial court is decided by the Supreme Court of the United States, which is not bound by a state court's interpretation thereof per *Carter v. State of Texas* (1900) 177 U.S. 442, 447.

The wife filed a trial brief on May 17, 1966 (R. 311-314), before the husband filed his amended counterclaim, citing State of Ohio statutory law pursuant to which the agreement was made, and Ohio case law which construed and approved this Ohio statutory law. The wife filed another brief dated July 27, 1966 with the trial court (472-485), before the trial court's final hearing and before the January 9, 1967 final trial court judgment and/or order (App. C), claiming that if the contract were broken per then section 65.15 Florida Statutes (1965): " . . . the following United States Constitutional provisions will be violated . . . " All the United States provisions set forth in the "Question Presented", supra at 7 were then listed. Many Supreme Court of the United States cases were cited as authority in this 27 July, 1966 trial court brief. Phrases were used, or quotations were made from many cases such as:

> [Florida cannot] " ' . . . deny full faith and credit to another state's laws . . . ' " (R. 481, P. 10); " ' . . . the undue extension of the statutes and authority of a state beyond its own borders by the expedient of rendering a judgment against a non-citizen over whose person or property the

> state had acquired jurisdiction, may infringe due process.' " (R. 482, P. 11); " 'To ignore the terms of the Ohio contract is to ignore the public acts of Ohio under and pursuant to which it was made . . .' " (R. 472-485). [brackets added]

Despite the wife's explicit and timely insistence that then section 65.15 Florida Statutes (1965) on its face was invalid, or at least that it could not be applied to the case sub judice because of its repugnancy to the United States Constitution, the trial court in its final judgment or order did not once allude to her constitutional contravention argument (R. 487-497). However, it is clear that such silence by the court, be it a trial court or appellate court, is not jurisdictional and constitutes a "negative disposition" of such argument.[1]

The wife filed an opening brief and a reply brief, with the District Court of Appeal, Second District, Lakeland, Florida (these have been certified only, and have been forwarded without indexing), which raised the same constitutional questions as were raised in the trial court, but cited additional Supreme Court of the United States cases. Page's Ohio Revised Code Annotated section 3103.05 was cited (opening brief at 19) and was quoted:

> " 'A husband or wife may enter into any engagement or transaction with the other . . . which either might if unmarried . . . ' "

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[1] *Harrell's Cand yKitchen, Inc. v. Sarasota-Manatee Airport Authority*, 111 So.2d 439 (Fla.Sup.Ct. 1959); *Evans v. Carroll*, 104 So.2d 375 (Fla.Sup.Ct. 1958); *accord Meyer v. City of Richmond*, (1898) 172 U.S. 82, 89; *Lawrence v. State Tax Commissioner* (1932) 286 U.S. 276, 282-283; *Dahnke-Walker Milling Company vs. Bondurant* (1921) 257 U.S. 282.

Page's Ohio Revised Code Annotated section 3103.06 was also quoted (opening brief at 19-20):

> " 'A husband and wife cannot, by any contract with each other, alter their legal relations except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation.' "

Seven (7) Ohio cases were cited, construing these statutory sections (opening brief at 20-21) e.g. *Hart v. Sarvis*, 3 N.P. 316, 30 D 708 was quoted:

> " 'Impliedly gives spouses the right to enforce contracts between each other.' "

Burlovic v. Farmer, 115 N.E.2d 411 (Ct.App. Ohio, 1953) was purportedly quoted:

> " 'Separation Agreement is a contract by law because of Section 3106.06, and binding if otherwise legally executed.' "

but actually reads:

> " 'The contract of separation being one authorized by law, it is therefore binding on the parties . . . "

Lowman v. Lowman, 139 N.E.2d 1 (Sup.Ct. Ohio, 1956) was cited,

> " 'An unanticipated change in the circumstances of the parties [would provide no relief to her if] there is no other reason for granting equitable relief therefrom.' " [brackets supplied]

The wife in her opening brief also told the court: (at 22)

> " 'Full faith and credit provisions' (U.S. Const. Art. IV, §1) require Florida to respect the Statutes of Ohio as they are the 'public acts' mentioned in the Constitution."

citing *Broderick v. Rosner* (1935) 294 U.S. 629, 645-647 as authority. The wife therein also advised the court: (at 23)

> "Ordinarily one state's court e.g. Florida, can refuse to enforce another state's laws, e.g. Ohio, and deny full faith and credit to another state's laws only if the test therefore is met as was set forth at *Williamson v. Weyerhaeuser Timber Co.*, 221 F.2d 5 (Ct.App. Oregon, 1955) supra, 'Something which offends by shocking moral standards or is injurious or pernicious to the public welfare . . . ' "

The wife therein also advised the court: (at 24)

"Accord *Chicago and Alton Railroad Company v. Wiggins Ferry Company* (1887) 119 U.S. 615, 622,

> ' . . . public acts of every State shall be given the same effect by the Courts of another state, that they have by law and usage at home.' "

The wife therein also advised the court: (at 27)

> " 'The undue extension of the statutes and authority of the state beyond its own borders by the expedient of rendering a judgment against

> non-citizens over whose persons or property the state has acquired jurisdiction may infringe due process.'"

quoting from *Pink v. A.A.A. Highway Express, Inc.* (1942) 314 U.S. 201, 211.

The wife in her closing brief (at 16-20) also argued constitutional issues like the above citing various cases of this court.

The judgment of the District Court of Appeal, Second District, Lakeland, Florida, like the trial court judgment, was silent regarding the constitutional questions which were drawn in question by the wife's briefs.[2]

THE QUESTION IS SUBSTANTIAL

The issue involved in this appeal is of ever-increasing substantiallity to ever-increasing numbers of persons, be they individuals, partnerships, corporations or others who are seeking to give some certainty and stability to their existence because:

1. Such persons and their business is of an ever increasing transitory nature with the consequent need, for example, to hold valid in State A those contracts that were made in State B and sanctioned by State B, strictly as the parties then intended, and strictly in accordance with the laws of State B, as decided in *Scudder v. Union National Bank* (1875) 91 U.S. 406, 412-413. This assumes the parties did not contract to have the contract be governed by the laws of a specified state.

[2]Again this is not jurisdictional supra note 1, at 11.

2. The strange attitude of the Florida courts below is that because of the Florida Statute involved, section 65.15 Florida Statutes (1965), they do not care in what state the contract sub judice was made (Ohio), or where it was delivered (Ohio), or where the contract is to be performed (usually Pennsylvania but the wife temporarily lives in North Carolina), or under which state's law it was made (Ohio), simply holding that if one of the parties resides in Florida, Florida can readily dictate the breaking of such contracts; the statute also dictates[3] that thereafter, nowhere in the world, even in Ohio where the contract was made and delivered, may suit be commenced to enforce the contract according to its tenor, contrary to *Griffin v. McCoach* (1941) 313 U.S. 498, 506 and *Bradford Electric Light Company v. Clapper* (1932) 286 U.S. 145, 160-161. Fine and/or imprisonment awaits the wife and her attorney if suit is so commenced, even in Ohio.[4] Indeed, Florida can extradite them.[5] Clearly this is a wrongful and unfair exertion in a vacuum of judicial power and/or legislative power. Surely Florida is not an independent island. The Florida courts below completely ignored the Ohio statutory and case law previously cited at 11, 12 supra, which prohibit such contract breaking. 76 *Harvard Law Review* 1233, 1246 (1963) also properly disapproves of this Florida attitude:

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[3]Thereafter the husband shall pay and be liable to pay the amount of separate support, maintenance or alimony directed in such order and judgment, and no other or further amount, and such agreement, or such decree, for the purpose of all actions or proceedings of every nature and wherever instituted, whether within or without this state, shall be deemed to be, and shall be, modified accordingly, and it shall be unlawful to commence, or cause to be commenced as party, or attorney, or agent, or otherwise, in behalf of either party in any court any action or proceeding otherwise than as herein provided, nor shall any court have jurisdiction to entertain any action or proceeding otherwise than as herein provided to enforce the recovery of separate support, maintenance or alimony otherwise than pursuant to such order and judgment.

[4]§§775.06, 775.07 F.S.A.

[5]*Cox v. State,* 180 So.2d 467 (2d D.C.A. Fla. 1965), interpreting chap. 941, F.S.A.

> " 'The second forum [e.g. Florida] may modify or cancel the [support] order only when those actions would be permitted under the law of the rendering state, and only upon the grounds valid thereto.' " [brackets added]

By asking for a modification under then section 65.15 F.S.A., the husband is asking a Florida Court to do that which, for example, were the parties before a New York court, the New York court would properly decline to do. In *Tiedeman v. Tiedeman*, 172 App.Div. 819, 158 N.Y. Supp. 851 (1916), though New York had a statute substantially like Florida's section 65.15 F.S.A. statute, the court said that since the Nevada decree did not reserve jurisdiction to modify, and Nevada did not have a statute that permitted support changing as New York did, New York could not modify the decree.[6] Accord *Patton v. Patton*, 67 Misc. Rep. 404, 123 N.Y. Supp. 329 (Sup.Ct., App. term, 1910)

3. The full faith and credit provision in the United States Constitution, Article IV, section 1, despite the lower courts' judgment and/or orders does require Florida to respect the statutes of Ohio and give effect to them as they are the "public acts" mentioned in the Constitution per *Chicago and Alton Railroad Company v. Wiggins Ferry* (1887) 119 U.S. 615, 622, supra at 4 which stated that:

> ". . . public acts of every State shall be given the same effect by the courts of another state, that they have by law and usage at home."

16 *Am. Jur 2d Constitutional Law* §436, at 781-782, states:

[6]The parties contract at paragraph 11 (R33-40) prohibits modification without joint consent.

> ". . . the laws which subsist at the time and place of making of a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms . . . The law which thus establishes the obligations of a contract is not general or universal law, but the law of the jurisdiction in reference to which the contract is made."

Accord *Broderick v. Rosner* (1935) 294 U.S. 629, 645-647, wherein a New Jersey statute was held unconstitutional which on public policy considerations prohibited suits against its citizens to enforce shareholders' liabilities for assessments allowed under New York law (the shareholders had made their contract in New York).

Accord *John Hancock Mutual Life Insurance Company v. Yates*, (1936) 299 U.S. 178, wherein a New York statute was held such an integral part of a contract of insurance that Georgia was compelled to sustain the contract under the full faith and credit clause. Accord, *Hughes v. Fetter, et al.* (1951) 341 U.S. 609. Here the Wisconsin courts had dismissed an action which alleged the wrongful death in Illinois of a citizen of Wisconsin, the suit being against another citizen of Wisconsin and an insurance company incorporated in Wisconsin. The suit was brought by the Wisconsin administrator using Illinois wrongful death law. The grounds for dismissal were that the Wisconsin wrongful death statute giving a right of action for wrongful death had, by a priviso that such action shall be brought for a death caused in the state, established a local public policy against entertaining suits brought under the wrongful death acts of other states. The Supreme Court of the United States held that Wisconsin law had to yield and give full faith and credit to the Illinois wrongful death law.

The courts below expressly ignored (though brought to their attention, at 17 of the wife's closing brief) the clear pronouncement of this court, that Florida could do to this contract only what Ohio could do it, per *People of the State of New York ex rel. Halvey v. Halvey* (1947) 330 U.S. 610, 614:

> "[it having not been] shown that the New York Court in modifying the Florida decree exceeded the limits permitted under Florida laws. There is therefore a failure of proof that the Florida decree received less credit in New York than it did in Florida." [brackets added]

Ohio cannot modify separation agreements (except for fraud, or mistake) per cases collected supra at 11-12.

4. The wife, by fiat of the courts below, has had retroactively and will have prospectively, large amounts of her property taken, despite the due process provisions of the United States Constitution, Amendments Nos. V and XIV, section 1. Previous decisions of the Supreme Court prohibiting this are:

(1) *Aetna Life Insurance v. Dunken* (1924) 266 U.S. 389 wherein the policy holder (plaintiff) and the Connecticut Insurance Company (defendant) made a contract in Tennessee (situs of contract), where the plaintiff policy-holder was resident. Plaintiff then moved to Texas and sued on the insurance policy against Aetna. The plaintiff applied for an additional 12% of the total judgment he recovered, which was due under Texas law because the defendant insurance company had improperly resisted payment, but which was not payable under Tennessee in-

surance law. The Court held that the Texas law could not place burdens on the defendant, which were not contracted for under Tennessee law, without violating due process considerations.

(2) *Hartford Accident & Indemnity Company v. Delta & Pine Land Company* (1934) 292 U.S. 143, rehearing denied 292 U.S. 607, wherein the contract concerned a fidelity bond by which the defendant, a Connecticut corporation, qualified to do business in Mississippi and Tennessee, had insured the Plaintiff, a Mississippi corporation with its principal office in Tennessee, against loss resulting from dishonesty of its employees "in any position, anywhere". The policy listed twenty-one employees who were then working in Mississippi. The contract, however, was negotiated and executed in Tennessee. It contained a condition that any claim under the contract had to be made within fifteen months from the termination of the suretyship agreement. One of the employees, whose acts were insured against, committed defalcations in Mississippi and the insured sued the indemnitor in that state. Mississippi Statutes Code 1930, section 2294, stated that all contracts were deemed made in that state; another Mississippi statute stated that all contracts of insurance on property, lives or interests in Mississippi were deemed made in Mississippi; another Mississippi statute stated that the Mississippi statutory periods of limitations of actions could not be altered by private agreements. The Mississippi court, applying these Mississippi statutes, struck down the aforementioned Tennessee-made contractual condition and allowed recovery on the contract dispite the plaintiff's failure to make claim within the contracted for fifteen-month period which short period was permitted

by Tennessee law. The Supreme Court reversed in an unanimous decision, holding that the Mississippi statutes could not be applied to the facts in this case.

(3) *Home Insurance Company v. Dick* (1930) 281 U.S. 396, 400, which involved a contract of marine insurance issued and paid for in Mexico and insuring a vessel which was never inside the state of Texas, the state in which suit on the policy was brought. The original insurance was payable in Mexico. After this insurance was issued, the risk was reinsured (outside of Texas) by a New York insurer which was qualified to do business in Texas. The original assured assigned the policy to a citizen of Texas who was then in Mexico and remained there until after the occurence of the loss, after which he returned to Texas and brought an in rem action in Texas by garnishment proceedings directed against the domestic insurance agents. The defendants pleaded a stipulation in the policy forbidding suit except within one year next following the loss. The Texas courts denied the defendants the benefit of this stipulation. They held it was invalidated by a Texas statute, Revised Statutes 1925, article 5545, outlawing such agreements. The Supreme Court of the United States reversed the Texas courts by a unanimous vote. In an opinion written by Mr. Justice Brandeis, the Court stated that the statute, as construed by the Texas courts, deprived the defendants of property without due process of law. This statute, the Court held, increased their obligation and imposed burdens they had not contracted for, and this the Court held, could not be done even in the name of the public policy of Texas.

Specifically in the aforesaid case, the court said:

> "It's [Texas's] attempt to impose a greater obligation than that agreed upon . . . violates the guaranty against the deprivation of property without due process of law." [brackets added]

(4) *Alaska Packers Association v. Industrial Accident Commission of California* (1935) 294 U.S. 532, 540 states:

> "The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction." [citations omitted]

Simply because one of the contracting parties is within Florida confers no jurisdiction upon Florida to modify the contract per the foregoing case which at 540 states:

> "Similarly a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state". [citations omitted]

The use of Florida mails by the husband to perform the contract does not mean that the husband is performing the contract in Florida per *Allgeyer v. Louisiana* (1897) 165 U.S. 578. The contract by its nature is performable where the wife normally resides (Pennsylvania) (ibid.).

5. The impairment of contract provision of the United States Constitution, U.S. Const. art. 1, § 10, was ignored by the judgments and/or orders below pursuant to *Coombes v. Getz* (1932) 285 U.S. 434 which states:

> "The authority of a state . . . does not extend to the destruction or impairment of vested property rights . . . "

Accord, *The Trustees of Dartmouth College v. Woodward* (1884) 4 Wheat. 518; accord *McGahey v. State of Virginia* (1885) 135 U.S. 662 which states:

> "The obligation of a contract is impaired, in the sense of the constitution, by any Act which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed at the time it was contracted, and does not supply an alternative remedy equally adequate and efficacious [citations omitted]

Accord, *Sturges v. Crowninshield* (1819) 4 Wheat. 122 (A debtor sought escape behind a state insolvency act of date of passage later than the debtor's note, and the act was held inapplicable to him, apparently as to hold it applicable would be an abuse of police power.)

The wife and the husband made their contract in reliance upon the decisions of the Ohio Courts[7] though the Ohio courts could not thereafter overrule these said decisions, if by so doing they would impair the Cordrey contract per *Sauer v. City of New York* (1907) 205 U.S. 536, 549, 556 citing as authority *Muhlker v. New York & Harlem Railroad Company* (1905) 197 U.S. 544, 570. The Florida courts purport to have such massive judicial power.

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[7]Supra at 11-12.

6. The foregoing cases show that the Supreme Court of the United States noted probable jurisdiction even where there were not as many constitutional issues involved as in the instant case, and where the "stakes" monetarywise were in almost every case far less than in the present case.

7. As aptly stated by the Supreme Court of the United States in *Hughes v. Fetter et al.* (1951) 341 U.S. 609, 611, 612, the following sets forth precisely the legal principle which should be applied in this case:

> "We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved. The clash of interests in cases of this type has usually been described as a conflict between policies of two or more states. The more basic conflict involved in the present appeal, however, is as follows: on the one hand is the strong unifying principal embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states, on the other hand is the policy of Wisconsin, as interpreted by its highest court, against permitting Wisconsin courts to entertain this wrongful death action. We hold that Wisconsin's policy must give way."

PROOF OF SERVICE

I, ROBERT SCOTT KAUFMAN, counsel of record for the appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of December, 1968, I forwarded a copy of the within appellant's Jurisdictional Statement and Appendix and this proof of service to the Attorneys for appellee, BUCKLEW, RAMSEY & STICHTER by first class mail prepaid to 403 Morgan Building, Tampa, Florida, who represent the only other party to this cause, other than appellant and the only party required to be served, all the foregoing and this Proof of Service pursuant to Rule 33, Rules of the Supreme Court of the United States.

ROBERT SCOTT KAUFMAN
Attorney of record for Appellant
317 Biscayne Building
10 West Flagler Street
Miami, Florida, 33130

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APPENDIX A

(CAPTION OMITTED)

ORDER DENYING PETITION FOR REHEARING

Upon consideration of petition for rehearing, it is ordered that said petition be and the same is hereby denied.

A TRUE COPY,

TEST:
SID J. WHITE
CLERK SUPREME COURT

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, ORDER OF JULY 18, 1968 IN THE ABOVE CAUSE)

APPENDIX B

(CAPTION OMITTED)

ORDER DISMISSING APPELLANT'S APPEAL

Upon consideration of motion to dismiss appeal, said motion is granted and it is ordered that the appeal be and the same is hereby dismissed, and it is further

ORDERED that appellant's motion for leave to file appellant's brief be and the same is hereby denied.

A True Copy

TEST:
SID J. WHITE
Clerk Supreme Court.

cc: Honorable Joseph E. Gillen
Honorable James F. Taylor
Honorable Sam Bucklew
Honorable Robert Scott Kaufman

APPENDIX C

(CAPTION OMITTED)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECREE

The plaintiff, Virginia Cordrey, brought an action in this court for specific performance of a written contract entitled "Separation Agreement" signed by her and the defendant, Dr. Lee James Cordrey, on the 4th day of December, 1956, in the State of Ohio. The defendant filed motions to dismiss the complaint and to strike plaintiff's prayer for attorney's fees. These motions were argued before the Court on May 11, 1966, and on May 20, 1966, the Court entered an order denying the former motion but granting the latter at that stage of the proceedings, orally announcing that the motion for attorney's fees might be renewed and considered by the Court at some future point, depending upon the issues raised by subsequent pleadings. In this same order the Court allowed the plaintiff's oral motion to amend her complaint, if necessary, to specifically allege the foreign laws claimed to be involved in the cause.

On June 14, 1966, the Court allowed the defendant to amend his answer and to file a counterclaim in the proceedings. Pursuant thereto, an amended answer and counterclaim setting up Chapter 65, Florida Statutes, as subjecting the question of alimony and support to review and modification, was filed on June 21, 1966.

The case is at issue, therefore, on the defendant's amended answer to plaintiff's complaint and the defendant's counterclaim and the plaintiff's answer thereto.

The Court has carefully considered all evidence offered by the parties, including oral testimony of witnesses adduced before the Court, testimony contained in several depositions taken by the parties and filed in the cause and all admissible documentary evidence relating thereto. The Court has also carefully examined certified copies of proceedings had and taken in the Court of Common Pleas No. 6 for the County of Philadelphia, Pennsylvania, in the divorce proceedings instituted by the plaintiff against the defendant, resulting in an absolute decree of divorce entered by the Court on January 30, 1959. In addition, the Court has listened to comprehensive argument of counsel for the respective parties and has studied and weighed their adversary legal contentions as contained in copious briefs which have been filed with the Court.

From the foregoing, the Court makes the following:

FINDINGS OF FACT

The plaintiff, a dancing instructor who was born on October 20, 1920, in North Carolina, and the defendant, a physician who was born on November 30, 1921, in Delaware, were married to each other on June 14, 1945, in the plaintiff's hometown of Landis, North Carolina, at the end of the defendant's senior year in the Medical College at Temple University which is located in Philadelphia, Pennsylvania. Shortly after the wedding ceremony, the couple moved to New Jersey to live for a year, after which they went to Largo, Florida, where the defendant was called for the performance of professional duties for a period of two years. Pursuing their migratory way, to meet the requirements of the defendant's advance in his medical specialty, they left Largo and es-

tablished a residence in Chamblee, Georgia, living and cohabiting there for three more years while the defendant was stationed at the Veterans Administration Hospital at that place. From Chamblee, the plaintiff and defendant transferred to Philadelphia and maintained residence in that city as man and wife for an additional two years and one month, during which time the defendant pursued duties at the Shriners' Crippled Children's Hospital and taught at Temple University. Thereafter, the defendant became a member, for one year, of the faculty of Duke University Medical School at Durham, North Carolina. The plaintiff did not live in Durham with the defendant but made periodic peregrinations on week-ends from Philadelphia to Durham, usually returning to Philadelphia on Monday mornings for the purpose of pursuing her career in the teaching of dancing at Arthur Murray Studios.

After completing his year on the faculty at Duke University, the defendant, still ambitiously pursuing his profession, moved on to Cleveland, Ohio, where he worked and resided until he came to Tampa, Florida, in 1958.

The plaintiff retained her residence in Philadelphia during this period but also continued her round trip week-end flghts, even to Cleveland, to visit with the defendant, until the separation of the parties in 1956, as hereinafter recited.

The plaintiff enjoyed her work at the Arthur Murray Dancing Studios in Philadelphia and, apparently, preferred to make that city her operating base from which to commute regularly on her off-hours to whatever locality in which the defendant might be residing. The de-

fendant, on the other hand, was intensely interested in his medical practice which he enjoyed to the extent that he was engrossed in its pursuit at least eighteen hours each day. He had no hobbies and no interests outside of his work, even though he lived alone except during the plaintiff's visits.

No children were born of the union of the plaintiff and defendant and none were ever planned by them.

Because of their migratory and desultory existence, together with the stresses and strains placed upon them by their divergent careers, the parties did not and could not travel together in a common main stream of life and were caught in the unpredictable and swift eddies of modern society, robbing them from the beginning of a normal and harmonious marriage. Prior to the time that the defendant became a member of the faculty of Duke University at Durham, North Carolina, the parties had experienced difficulties because of the defendant's alleged infidelities and indiscretions, some of which have not been denied by him, when the plaintiff was away. Embarrassing confrontation, relative to the defendant's disloyalty, created impasses between the parties and temporary retreats by the plaintiff from the marital relationship. These retreats usually ended upon the defendant's promise of more circumspect behaviour. The only occasions during which the plaintiff and defendant lived together in peaceful communion as husband and wife after the defendant moved to Durham were on the week-end visits of the wife, during the few periods of reconciliation and withdrawal from these emotional impasses until their final separation which occurred in May, 1956, according to the testimony of the plaintiff in the divorce proceedings which

finally and completely severed the union between the parties. In her deposition filed in the present cause, she testified that the final separation of the parties occurred in July or August of 1956 and that, thereafter, on December 4, 1956, the date on which the separation agreement was signed, the defendant requested her to return to him as his wife, both before and after signing the agreement. She further testified that his request before the signed agreement was refused, largely because of the infelicitous manner in which it was advanced by the defendant. She testified that, although the defendant made love to her on the occasion of the request after the signing, she refused because she hoped the separation would bring about a sound reconciliation later.

The separation agreement provided that in each calendar year, beginning with the calendar year 1957, the defendant would pay to the plaintiff for her support an amount equal to 33 1/3% of his net income, said payments to be in periodic installments as provided in the agreement. It also provided that the obligations of the defendant to pay any money to the plaintiff would cease upon her remarriage or upon death of either of the parties.

The agreement further provided that life insurance in the amount of $50,000 would be provided as a guarantee to said wife should the defendant die leaving the plaintiff-wife surviving and unmarried. It also provided that the defendant would deposit the sum of $10,000 to be paid to the plaintiff in the event a final decree of divorce was obtained by her. This sum, which had been placed in escrow, was received by the wife upon entry of the final decree of divorce. In addition, the defendant delivered to the plaintiff bonds which had been held jointly and the household furniture except for a bedroom suite.

The parties lived separate and apart under the separation agreement for a period of approximately two years and on January 3, 1959, the final decree of divorce was obtained by the plaintiff against the defendant in the Court of Common Pleas No. 6 for the County of Philadelphia, State of Pennsylvania, upon the grounds of "indignities to the person".

The said final decree of divorce entered by the Pennsylvania Court made no mention of any agreement to pay support or alimony and made no provisions for the payment by the defendant to the plaintiff for any support whatsoever.

The plaintiff may be adequately and satisfactorily maintained in the style and manner to which she is accustomed on an income not exceeding $1,000 per month. The plaintiff admitted that $1,000 per month would satisfy her needs in this regard, and, under the circumstances, this amount is reasonable. The defendant has the present financial ability to meet such needs.

The defendant subsequently remarried and continued to make support payments to the plaintiff under the separation agreement until the year 1965, during which year the defendant paid to the plaintiff the sum of $5,000.

As of the date of this decree, the plaintiff has never remarried.

During all of the negotiations relative to the drafting and execution of the separation agreement, the defendant, by his own choice, was not represented by legal counsel. The plaintiff was represented by counsel in all matters and negotiations pertaining to the agreement and the divorce.

The separation agreement made no provision for payment of attorney's fees, but, inasmuch as some relief is being afforded the wife, as a result of this action upon the pleadings, the plaintiff is entitled to a proportionate attorney's fee based upon a reasonable value of services rendered by the attorney for the same. The Court finds that the sum of $6,500 is a reasonable proportionate fee. The defendant has paid to the plaintiff, under the agreement, up to the present time, the amount of $156,939.18. As of the date of the filing of this proceeding on March 11, 1966, the defendant owed to the plaintiff, under the terms of the separation agreement, the sum of $98,542.42 plus accrued interest at 6% per annum from the due dates of the various installments of $1,864.17.

At no time before the institution of this suit did the plaintiff make any demand to inspect the records of the defendant relative to the payments due her under the said agreement.

The plaintiff is in basically good health. She owns a building containing ten apartments and a shoe repair shop in Philadelphia, Pennsylvania, for which she paid approximately $39,500, and a small grocery store in Landis, North Carolina, the purchase price of which was $12,000 and on which there is still owing a balance of some $5,000. There is a mortgage on the apartment building in Philadelphia in the approximate amount of $10,000. She owns bonds in the amount of approximately $2,000 and mutual fund shares which approximate $5,000. At the present time she is living in Landis, North Carolina, with her invalid father whom she is nursing. The plaintiff is a high school graduate and has studied business administration. Her income from dancing instructions, which she is unable to perform at the present time due to injuries to her back and ankle, ranged from $5,000 to $10,000. She also owns a modest home in the Poconos.

The defendant has developed into a skillful and well-known specialist and his income from his practice has been more than substantial during the past several years. His net worth is approximately $150,000. His estimated gross income for 1966 is over $300,000; however, he has been overworked and his prospects for the future indicate that his income will be sharply curtailed if he is to maintain his health and practice. The plaintiff contributed the lion's share of financial assistance to the defendant in the early years of their marriage and loyally and vigorously aided him during that time to complete his training in his medical specialty. At the time the parties were married, the defendant was working for a small monthly salary. At the time of the separation between the parties he received a respectable or better income and his prospects for professional and financial success were apparently very good. However, it was never anticipated that his income would reach its present proportion. His income before taxes for 1956 was $61,505.71.

The separation agreement between the parties has never been reviewed or approved in any judicial proceeding or made a part of any decree of any judicial tribunal.

DISCUSSION OF FACTS

The Court has noted with disapproval the attitude and conduct of the defendant, which brought about the divorce, but the Court is likewise cognizant, from the evidence, that the plaintiff voluntarily lived apart from the defendant for a number of years and saw fit to visit him only on week-ends. This was by choice, which prevented her from making any real, intelligent and effective attempt to save and preserve the marriage of the parties

after it was placed in jeopardy by the defendant's indiscretion and infelicity and the plaintiff's reaction thereto. On the contrary, the plaintiff, however, unintentionally, contributed to the situation in which the defendant, by his behaviour, placed himself. The Court is led to the conclusion that the attitude and conduct of the plaintiff, as well as the contretempts of the defendant resulting from the circumstances of his unwise extra-marital association precipitated a condition which ultimately brought about the execution of the separation agreement and subsequent dissolution of the marriage. The Court is also persuaded, from the evidence, that the defendant's real or fancied cul-de-sac, created by what he believed to be threats of publicity and scandal concerning his associations, was the overwhelming reason for his entering the separation agreement requiring him to pay the plaintiff 1/3 of his future net income plus a flat sum of $10,000 for obtaining the divorce.

Based upon the foregoing, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of this litigation.

2. The agreement herein sued upon is an agreement to pay alimony or to make periodic support payments in lieu of alimony and is not a property settlement agreement as construed and determined by the law of Florida. (Kosch v. Kosch, 113 So.2d, 547)

3. The bringing of this action by the plaintiff to enforce the terms of the subject agreement to pay alimony or support in lieu of alimony, and the answer and counterclaim of the defendant, confer upon this court the power and impose upon it the duty to review and adjudicate the reasonableness and fairness of the terms of the agreement, which has never been reviewed or ruled upon by any other judicial tribunal, as provided under the provisions of Chapter 65, Florida Statutes.

4. In the absence of specific pleading and proof of any foreign law applicable to this case, the law of Florida should obtain and control this case. (Kingston v. Quimby, 80 So.2d, 455; Miller v. Shulman, 122 So.2d, 589; Hieber v. Hieber, 151 So.2d, 646)

5. The present needs of the wife and the former husband's ability to meet those needs, as determined by applicable principles of law, are to be considered by the Court in its determination of the amount of alimony or support to which the wife is fairly and reasonably entitled under contemporary facts and circumstances and the parties may not, by contract, divest the Court of its discretion in this regard.

6. The terms of the separation agreement are inequitable, as a matter of law, and must be modified to comport with fairness.

7. While the final decree of divorce obtained by the plaintiff-wife contains no provisions for alimony or support, the Court further concludes that it would also be inequitable to eliminate all obligations on the part of the defendant for support or to relieve him of his obligations under the agreement prior to the date of the filing of this proceeding.

8. The case of McAllister v. McAllister, 3 So.2d, 351, relied upon by the plaintiff, does not govern the instant case inasmuch as the defendant in McAllister did not interpose the defense made here under Chapter 65, Florida Statutes.

9. The monies due for the year 1965, under the provisions of the agreement and up to March 11, 1966, are owing and payable by the defendant to the plaintiff. The defendant is also legally obligated to pay the plaintiff support since March 11, 1966, upon the basis of $1,000 per month.

It is, therefore, ORDERED AND DECREED as follows:

1. The defendant, Lee James Cordrey, shall pay to the plaintiff, Virginia Cordrey, the sum of $1,000 per month for her support and maintenance so long as she lives and remains unmarried, beginning on the 11th day of March, 1966.

2. The defendant, Lee James Cordrey, shall pay to the plaintiff, Virginia Cordrey, in addition to the above amounts, the sum of $100,406.59, the amount in default, including interest, under the terms of the separation agreement sued upon, with interest at 6% from the date of this decree. The defendant is hereby authorized to pay the said amount now in default, under the said agreement, to the plaintiff in equal monthly installments of at least $1,000 per month, said installments to be applied first to interest and the remainder to principal on the said total amount in default and to continue until said amount in default is paid in full.

3. All payments herein ordered shall be paid by the defendant, Lee James Cordrey, to the plaintiff, Virginia Cordrey, until the remarriage of the plaintiff, Virginia Cordrey, or the death of either party to this proceeding, unless hereafter further modified by the Court.

4. The defendant, Lee James Cordrey, shall also pay Robert Scott Kaufman, attorney for the plaintiff, the sum of $6,500 for legal services rendered to the plaintiff in this suit, payable within thirty days from the entry of this decree.

5. The costs of this proceeding shall be paid by the defendant, Lee James Cordrey, as hereinafter determined and taxed by the Court.

6. The sum of $7500 paid to the plaintiff by the defendant as relief pendente lite in this suit shall be subtracted from the amount in default herein ordered to be paid to the plaintiff.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, this 9th day of January, 1967.

JOHN G. HODGES
CIRCUIT JUDGE

APPENDIX D

Section 65.15 Florida Statutes (1965) Volume 1, Page 262.

65.15 Modification, alimony decrees, agreements, etc.

Whenever any husband and wife heretofore, or hereafter, shall have entered into any agreement providing for the payments for, or in lieu of, separate support, maintenance or alimony, whether in connection with any action for divorce or separate maintenance, or with any voluntary property settlement, or whenever any husband has pursuant to the decree of any court of competent jurisdiction been required to make to his wife any such payments, and the circumstances of the parties or the financial ability of the husband shall have been changed since the execution of such agreement, or the rendition of such decree, either party may apply to the circuit court of the circuit in which the parties, or either of them, shall have resided at the date of the execution of such agreement, or shall reside at the date of such application, or in which such agreement shall have been executed, or in which such decree shall have been rendered, for an order and judgment decreasing or increasing the amount of such separate support, maintenance or alimony, and the court, after giving both parties an opportunity to be heard, and to introduce evidence relevant to the issue, shall make such order and judgment as justice and equity shall require, with due regard to the changed circumstances and the financial ability of the husband, decreasing or increasing or confirming the amount of separate support, maintenance or alimony provided for in such agreement, or in such decree.

Thereafter the husband shall pay and be liable to pay the amount of separate support, maintenance or alimony directed in such order and judgment, and no other or further amount, and such agreement, or such decree, for the purpose of all actions or proceedings of every nature and wherever instituted, whether within or without this state, shall be deemed to be, and shall be, modified accordingly, and it shall be unlawful to commence, or cause to be commenced as party, or attorney, or agent, or otherwise, in behalf of either party in any court any action or proceeding otherwise than as herein provided, nor shall any court have jurisdiction to entertain any action or proceeding otherwise than as herein provided to enforce the recovery of separate support, maintenance or alimony otherwise than pursuant to such order and judgment.

This section is declaratory of existing public policy and laws of this state, which is hereby affirmed and confirmed in conformance with the provisions hereof, and it shall be the duty of the judges of the circuit courts of this state to construe liberally the provisions hereof in order to effect the objects and purposes hereof and the public policy of the state as hereby declared.

APPENDIX E

SEPARATION AGREEMENT

This Agreement made and entered into at Cleveland, Ohio, this 4th day of December, 1956, by and between VIRGINIA CORDREY, hereinafter referred to as the "Wife" and DR. LEE JAMES CORDREY, hereinafter referred to as the "husband";

WITNESSETH:

WHEREAS, the parties hereto were married on the 14th day of June 1945, and no children were born as the issue of said marriage; and

WHEREAS, certain marital differences and difficulties have arisen between the parties hereto in consequence of which they are now living separate and apart; and

WHEREAS, it is the desire and intention of the parties hereto that their relationship, with respect to property and financial matters, as well as their rights and obligations arising out of and by virtue of said marrigae relationship, be conclusively and finally fixed by the terms, provisions and conditions of this Agreement in order to settle and determine, in all respects and for all purposes, their respective present and future property rights, claims, demands, obligations and privileges in such manner, that any action with respect to such rights, obligations and privileges, past, present, and future of either party hereto against the other shall be finally and conclusively settled and determined by this Agreement.

NOW, THEREFORE, for valuable consideration mutally received, and in consideration of the mutual promises and undertakings herein set forth, the parties hereto agree as follows:

1. The Husband shall, in each calendar year beginning with the calendar year 1957, pay to the Wife for her support and maintenance, an amount equal to 33 1/3% of his net income, said payments to be periodic installments as hereinafter provided. For the purpose of this Agreement "net income" shall be the gross income of the Husband from all sources whether taxable or non-taxable, on a cash basis of accounting, as presently defined by the Internal Revenue Code, minus only his business expenses presently allowed as a deduction by the Internal Revenue Code and as finally determined for the purpose of computing the Husband's liability for Federal Income Tax. Gains and losses from the sale, exchange or other disposition of capital assets shall be taken into account for the full 100% thereof. No deductions for alimony payments, charitable contributions or interest on indebtedness now or hereafter owed by the Husband shall be allowed. If pursuant to changes in the Federal Income Tax laws becoming effective after the date hereof, the amounts paid under this paragraph shall not be deductible by the Husband in computing income for the purpose of his Federal Income Tax for any year and shall not be includible by the Wife in computing her income for the purpose of her tax return for that year, then net income hereunder shall, commencing with any such year, be computed by deducting the amount of the Husband's Federal Income Tax for such year.

2. It is the purpose of this Agreement to provide three (3) categories of periodic payments, to wit: "tentative payments," "estimated payments", and "final payments".

(a) "Tentative payments". For the year 1957, the Husband shall pay to the Wife $694.55 on or before the 5th day of each month commencing January, 1957. For each calendar year thereafter the Husband shall pay to the Wife on or before the 5th day of each month an amount equal to one-twelfth (1/12) of one-third (1/3) of the net income of the Husband for the calendar year immediately preceding the calendar year in which said monthly payment is being made.

(b) "Estimated payments". At any time before the close of the calendar year, the Husband may estimate the amount due to the Wife under paragraph 2 hereof for that year and may pay any excess of his estimated liability over the tentative payments theretofore made for that year. If the Husband estimates that his liability for the year will be less than the tentative payments theretofore made by him for that year, he shall so notify the Wife, not earlier than December 1, and not later than December 15, of the amount of his estimated overpayment based upon his income actually received to date, a statement of which he shall simultaneously furnish to the Wife, and the Wife shall forthwith repay the amount of the Husband's estimated overpayment. Tentative payments shall, in no event, be considered overpaid to the extent that they do not exceed $1,000.00.

(c) "Final payments". On or before January 31st of each year commencing January 31, 1958, the Husband shall pay to the Wife the amount due under paragraph 2 hereof, namely one-third of his net income, less all tentative and estimated payments theretofore made by him for that year, which payment shall be accompanied by a statement prepared by the Husband's accountant and certified by said accountant as being correct, showing in detail the Husband's gross income, business deductions and net income (as hereinabove defined) for the preceding calendar year. If the aggregate of tentative and estimated payments exceeds the amount due under paragraph 2 hereof, the excess shall be repaid by the Wife to the Husband within five (5) days after the receipt by her of said statement from the accountant. In the event that the Husband's income shall be subsequently redetermined in the computation of Federal Income Tax liability, an appropriate adjustment between the parties shall be made within thirty (30) days after the final determination of such liability.

3. The tentative payments as provided in paragraph 2 hereof shall be discontinued immediately upon the death of either party hereto and no payments shall be required for any years following the year in which either party dies. If the Husband dies first, the final payment for the calendar year during which he dies shall be computed upon his net income for the part of the calendar year during which he was alive and shall be paid by his executors, administrators or legal representatives, as the case may be, on or before January 31, of the succeeding year. If the Wife dies first, the final payment for the

calendar year during which she dies shall be computed upon the net income of the Husband for the entire calendar year multiplied by the number of days in the calendar year during which she was alive and divided by 365. This final payment shall be made by the Husband to the Wife's executors, administrators or legal representatives, as the case may be, on or before January 31st of the succeeding year.

4. In the event that the Wife should obtain a divorce from the Husband and subsequently remarry at any time thereafter, the Husband shall continue the payments due hereunder for the balance of the calendar year in which the Wife remarries, including the final payment due for said year, as provided in paragraph 2(c) hereof. After the end of the calendar year in which the Wife thus remarries, the Husband shall have no further obligation to make any such payments for maintenance and support to the Wife.

5. At reasonable periods upon the Wife's request, the Husband shall make available for examination by the Wife or by an attorney or certified public accountant designated by her at the offices of the Husband, such books, records, copies of tax returns, including Federal Income Tax returns, etc., as shall be reasonably necessary to enable the Wife or her attorney or accountant to determine whether the Husband's accountant's determination of the Husband's net income during any year is true and correct. Any information derived from such examination shall not be divulged by the Wife or her representative to any other person, without prejudice however to her right to use said information in any proceeding in connection with any claim which she may assert against the Husband under this Agreement.

6. All property, whether real, personal or mixed, and wherever situate, that the Husband now has or to which he is or may become entitled, whether acquired prior or subsequent to the marriage of the parties, shall be the separate property of the Husband save and except for the following:

(a) All United States government bonds heretofore acquired by either or both of the parties hereto and issued in the names of the Husband and/or Wife, which shall be the exclusive property of the Wife and the Husband renounces any and all interest in and to said bonds.

(b) All household furniture located at the residence of the Husband at 2840 South Moreland Boulevard, Cleveland, Ohio, including but not limited to, appliances, linens, silverware, crystals, dishes, and furniture (except for the bedroom suite), all of which household furniture shall be and remain the property of the Wife free and clear of any claim whatsoever on the part of the Husband, and said household furniture shall be delivered to the Wife immediately following the signing of the within Agreement, provided however that the Wife shall bear any and all expenses incident to moving said furniture from the aforesaid residence of the Husband.

(c) The sum of $10,000.00 which shall be deposited by the Husband in escrow with Gerald W. Ullman, Esq. and Joseph H. Persky, Esq. simultaneously with the execution of the within Agreement, and which $10,000.00 shall be delivered by the said

escrow agents to the Wife, if as and when a final divorce shall be obtained by either the Husband or Wife. Upon delivery of said $10,000.00 to the Wife, the same shall be hers absolutely and forever.

(d) Each of the parties hereto shall own as his or hers separate property respectively any and all of his or her clothing, jewelry, professional equip- and personal effects.

All property whether real, personal or mixed and wheresoever situate, acquired by the Wife prior to or subsequent to the marriage of the parties hereto shall be the separate property of the wife.

7. Simultaneously with the execution of the within Agreement, the Husband shall deliver to Gerald W. Ullman, Esq., a $10,000.00 paid-up life insurance policy issued by the Prudential Life Insurance Company upon the life of the Husband, which policy shall be assigned to said escrow agent and shall designate the Wife as beneficiary thereof. Said policy shall be held by the escrow agent as collateral security for the payment of all of the monetary obligations of the Husband hereunder. Notice of any default in the monetary obligations of the Husband hereunder shall be given in writing by the Wife to the escrow agent and a copy thereof shall, at the same time, be mailed to the Husband. If, within thirty (30) days after receipt of the Wife's notice of default, the escrow agent does not receive proof from the Husband of the curing of the alleged default, the escrow agent shall assign and deliver said policy to the Wife and the same shall thenceforth be hers absolutely and forever. The delivery of said policy to the Wife shall not relieve

the Husband of any of his monetary obligations hereunder, but he shall be entitled to a credit against such obligations equal to the cash surrender value of the said policy as of the date of delivery of the same to the wife. Upon the death or remarriage of the Wife said policy shall be redelivered to the Husband, provided that he is not in default hereunder or provided that said policy has not been delivered to the Wife in accordance with the terms hereof. Upon the death of the Husband, said policy shall be delivered to the executors, administrators or legal representatives of the Husband, as the case may be, provided that the Husband is not in default hereunder or provided that said policy has not been delivered to the Wife in accordance with the terms hereof.

8. The Husband shall obtain, maintain and continue in full force and effect for a period of ten (10) years from the date hereof, free and clear of any and all encumbrances, policies of insurance in the total face amount of $50,000.00 upon his own life, payable in the event of his death to the Wife, said policy or policies to be ten-year term insurance, with the Wife designated as the owner and beneficiary thereof. If the Husband fails to maintain such policy or policies, his estate shall be liable to the Wife, in the event that she survives him and he dies within ten (10) years from the date hereof, for the sum of $50,000.00, or if a lesser of such insurance is payable to the Wife for the difference between $50,000.00 and the reduced amount of such insurance payable to the Wife and any such amount thus payable to the Wife shall be treated as a claim against the estate of the Husband. At the end of any calendar year in which the Wife shall remarry, or in the event the Wife predeceases the Husband, all rights in such policy or policies shall belong to the

Husband who may then change the beneficiary thereof, surrender or cancel the said policy or policies or exercise any other right available to him as the owner thereof. The Husband agrees that during the period of ten years after the date hereof, or except as otherwise provided herein, he will pay promptly all premiums on said policy or policies, will not change the designation of the Wife as the principal beneficiary and will at the request of the Wife and from time to time exhibit said policy or policies to her, together with the receipts of the payment of any and all premiums due thereon.

9. The parties, have heretofore filed joint Federal Income Tax returns and have filed a joint Declaration of Estimated Tax for the year 1956. In connection with said tax returns, it is hereby agreed that the Husband shall pay the balance of the installments of Federal Income Tax for the year 1956 and the parties will file a joint Federal Income Tax Return for the year 1956. The Wife shall have no liability and the Husband agrees to idemnify and hold the Wife harmless from any liability arising out of said joint Federal Income Tax return except that if the total liability on said joint Income Tax return exceeds the liability which would have been due if the Husband had filed a separate return, then the Wife shall pay the Husband the amount of such excess. All liabilities on joint Income Tax returns heretofore filed by the parties shall be borne by the Husband who will indemnify and hold the Wife harmless from any claim or expense arising out of any such returns. Any refunds due on any such returns shall belong to the Husband and the Wife will promptly sign or endorse any receipts, vouchers, or refund checks required to effect the collection of any such refunds by the Husband.

10. Except as herein otherwise provided, each party may dispose of his or her property in any way, and each party hereby waives and relinquishes any and all rights he or she may now have or hereafter acquire under the present or future laws of any jurisdiction to share in the property or the estate of the other as a result of the marital relationship, including but not limited to dower, division of property, statutory allowance, widow's allowance, right of distributive share in the other's estate or any other property rights, benefits or privileges accruing to either party by virtue of said marriage relationship or otherwise. It is the understanding of said Husband and Wife that this Agreement, except as otherwise provided herein, forever and completely adjusts, settles, disposes of and completely terminates any and all rights, claims, privileges and benefits that each now has, or may claim to have, against the other arising out of said marriage relationship or otherwise.

11. Each party hereto shall execute any and all instruments and perform any and all acts which may be required or necessary to carry out and effectuate the terms and conditions of the within Agreement. This Agreement shall not be altered, changed or modified except by the written consent of both of the parties hereto.

12. Anything herein contained shall not be deemed to prevent either of the parties hereto from maintaining a suit for absolute divorce against the other party, nor to bar the other from defending any such suit. Nothing herein shall be construed to vitiate any rights that may have already accrued to either party under the divorce statutes of Ohio or Pennsylvania. In the event any such action for divorce is instituted by either of the parties hereto, both of the parties shall be bound by all of the terms of this Agreement and this Agreement shall

be submitted for approval to the court granting such divorce if required, and upon approval of this Agreement by the said court, shall be incorporated in such decree either by attachment thereto or by reference to this Agreement. If the Husband shall breach any provision of this Agreement, the Wife at her election shall have the right to sue for damages for such breach, rescind this Agreement, or seek such other remedies or relief as may be available to her.

13. Each party fully understands all of the terms herein set forth and each party has read this Agreement and finds the same to be in accordance with his and her respective understanding. This Agreement shall be binding upon the parties hereto and their respective heirs, executors, administrators and legal representatives.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands at the time and place first hereinabove written.

Witnesseth:

/s/Gerald W. Ullman
/s/Joseph H. Persky

As to Wife

/s/Gerald W. Ullman
/s/Joseph H. Persky

As to Husband

/s/Virginia Cordrey
Virginia Cordrey
"Wife"

/s/Dr. Lee James Cordrey
Dr. Lee James Cordrey
"Husband"

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No. 859

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

VIRGINIA CORDREY,

Appellant,

v.

DR. LEE JAMES CORDREY,

Appellee.

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS

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February 1969

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 859

VIRGINIA CORDREY,

Appellant,

v.

DR. LEE JAMES CORDREY,

Appellee.

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS

STATEMENT

The appellant, Mrs. Virginia Cordrey, and the appellee, Dr. Lee James Cordrey, were married to one another from June 14, 1945, until January 30, 1959, when they were divorced. They had separated in 1956, and on December 4, 1956, they executed a separation agreement by which Dr. Cordrey agreed to pay Mrs. Cordrey one-third of his net income each year. The agreement was not written into the divorce decree, which made no provision for alimony. There are no children.

Dr. Cordrey was living in Cleveland at the time the separation agreement was made, practicing medicine. Mrs. Cordrey lived in Philadelphia. She was a dancing instructor and had remained in Philadelphia after appellee had left

there first to spend a year on the faculty of the Medical School of Duke University in North Carolina and then to practice in Cleveland and thereafter, since 1958, in Tampa, where he now lives. Until the couple separated she had visited her husband on weekends while maintaining her Philadelphia home and job. They had previously lived together in New Jersey for one year, Florida for two years and Georgia for three years.

Dr. Cordrey remarried after the divorce. In 1965 he fell into arrears in his payments pursuant to the separation agreement. He had paid Mrs. Cordrey more than $150,000 before defaulting. Mrs. Cordrey brought suit for specific performance of the agreement, invoking the jurisdiction of the Circuit Court for Hillsborough County (Tampa), Florida. The court ordered Dr. Cordrey to pay the amount that he was in default, which with interest was more than $100,000, and for the future directed him to pay Mrs. Cordrey $1,000 a month until she remarried. The court said that Mrs. Cordrey had admitted that this continuing amount would satisfactorily maintain her.

In thus modifying Dr. Cordrey's obligations, the court took into account the circumstances of Mrs. Cordrey, who had substantial investments and whose earnings as a dancing instructor had been significant, and the fact that it was real or fancied threats of publicity and scandal that led Dr. Cordrey in 1956 to agree to pay his then wife one-third of his net income each year. The court acted under a Florida statute, F.S.A. § 65.15, which authorizes the courts of the state on the request of either party to modify the provisions of any separation agreement because of changed circumstances of the parties.[1]

The judgment of the trial court was affirmed by the District Court of Appeal, which said that there was "over-

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[1] The foregoing paragraphs are based upon the findings and conclusions of the trial court (Jur. St. App. 2-13) and the opinion of the District Court of Appeal (206 So. 2d 234).

whelming evidence of changes in the circumstances of the parties . . . subsequent to the execution of the agreement." (206 So. 2d at 241). Thereafter Mrs. Cordrey attempted to take an appeal to the Florida Supreme Court, but the appeal was dismissed on Dr. Cordrey's motion. The motion was made on the ground that Mrs. Cordrey had pursued the wrong procedure in attempting to bring her case before the Supreme Court.

In none of her pleadings in the trial court did Mrs. Cordrey allege that modification of the agreement pursuant to F.S.A. § 65.15, which was specifically invoked by Dr. Cordrey, would violate any provision of the Federal Constitution. Nor did Mrs. Cordrey in any of her pleadings allege that the law of any other state than Florida should control or the content of any such sister-state law.

ARGUMENT

I

The only question presented in this case is a question of state law: whether the Supreme Court of Florida correctly read and applied the provisions of the Florida Appellate Rules that govern its jurisdiction and the procedure for invoking its jurisdiction.

Rule 2.1(5)(b) provides that appeals to the Supreme Court from the district courts of appeal may be taken as a matter of right "only from decisions initially passing upon the validity of a state statute . . . or initially construing a controlling provision of the Florida or federal Constitution." By the same rule, the Florida Supreme Court may review by certiorari certain other decisions of the courts of appeal.

Dr. Cordrey's motion to dismiss Mrs. Cordrey's appeal alleged that the Supreme Court did not have jurisdiction on appeal under Rule 2.1(5)(b), that review could be had only on certiorari and that no constitutional question was involved. Certainly on the face of the opinion of the District Court of Appeal no question of the validity of any

state statute or other constitutional question was decided. Thus, even if it were open to question here, the decision of the Florida Supreme Court to grant appellee's motion to dismiss was clearly right. Moreover, on appellant's view that she raised federal constitutional claims that were denied by the Florida courts sub silentio she mistook her appellate remedies and properly suffered dismissal of her appeal. If she were right, the constitutional question was not "initially" decided by the District Court of Appeal but by the trial court, where she claims first to have raised the constitutional issues, and according to another provision of the Appellate Rules, Rule 2.1(5)(a), her appeal from the trial court lay to the Supreme Court and not the District Court of Appeal.[2]

In no event is the case properly here, and the appeal to this Court should be dismissed for want of jurisdiction.

II

The fact is that appellant did not adequately state any federal constitutional claim in the trial court or even allege the sister-state law underlying any such claim.

A

By her own account (Jur. St. 9-14), appellant mentioned the federal constitution a few times in briefs but never in a pleading or other document of record or in any other way that would squarely pose the issue so as to require the Florida courts in deciding against her necessarily to deny a constitutional claim. These passing mentions constitute neither an adequate nor a timely insistence on federal constitutional rights. This is not a case in which "the record as a whole shows either expressly or by clear intendment" that a federal constitutional claim was "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

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[2] Florida Appellate Rule 2.1(5)(a) and (b) is set out as an appendix to this motion (pp. 12-13, *infra*).

Moreover, although this is a minor point given the numerous other jurisdictional and substantive infirmities of appellant's case, if she made any constitutional claim at all, again by her own account it was not a claim that a Florida statute was unconstitutional in its application to her even within the liberal doctrine of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). Thus, the case clearly would not be properly here on appeal even if it were properly here at all, which it is not.

B

Not only did appellant fail to insist on her alleged federal constitutional rights in an adequate way but she did not properly place before the Florida courts the premise for her federal claim—the status and provisions of the sister-state law that she says should have been applied.

Florida has adopted the Uniform Judicial Notice of Foreign Law Act, F.S.A. § 92.031.

> "However, the Act does not operate automatically in every case. On the contrary a party intending to take advantage of its provisions by asking that judicial notice be taken of a foreign law has the obligation to give reasonable notice of that intention to the adverse parties, either in the pleadings or otherwise." *Kingston v. Quimby*, 80 So. 2d 455, 456 (Fla. 1955).

This view, which is the customary interpretation of the Uniform Act, see *id.* at 457, comports with elementary fairness and sound judicial administration. A party should not be entitled to claim the applicability of a sister-state's law if the party has not established, first, that the sister-state's law should apply and, second, what the content of that law is. Therefore, "when the foreign law is not made to appear in timely and appropriate fashion by the interested party, the court will apply the law of the forum." Currie, *On the Displacement of the Law of the Forum*, 58 Colum. L. Rev. 964, 1027 (1958).

Appellant failed to meet this elementary requirement. In her complaint no mention was made of Ohio law or of the law of any other state. She did move orally to amend her complaint, if necessary, to allege specifically any foreign law she might claim was involved in the case, and the trial court granted the motion (Jur. St. App. 2). Still no allegation of Ohio law was forthcoming. Thus, it was a rule of pleading and practice—and one which has widespread acceptance—that defeated the application of Ohio law to this controversy. It is of course a customary rule that on matters of pleading and practice the law of the forum applies. *E.g.*, Restatement, *Conflict of Laws* §§ 592, 595 (1934). This raises no question warranting consideration by the Court.

III

Even if it were assumed that the law of a state other than Florida should have been applied, appellant has not established that Ohio's law should control.

The law that ordinarily governs matters relating to the performance of a contract is that of the state most substantially related to the contract. Goodrich, *Conflict of Laws* § 114 (4th Scoles ed. 1964). Traditionally this meant (and often still does) the state where the contract is to be performed. Restatement, *Conflict of Laws* § 358 (1934).

Several states have contacts with the separation agreement involved in this case. Ohio is certainly one: The contract was executed there, and Dr. Cordrey lived there at the time of execution. Pennsylvania is certainly another: Mrs. Cordrey had lived there, apart from her husband except on weekends, for two years or so before the separation agreement was entered into,[3] she has continued to live

[3]Whether her "domicile" was in Pennsylvania or was in Ohio, where her husband was then living, is not an easy question, though the modern view would favor the former choice, Goodrich, *supra* § 36. The fact that she lived in Pennsylvania is unquestioned, however.

there since the separation agreement, she rents an apartment, owns another home and owns an apartment building and a shoe repair shop there, and it was there that she obtained a divorce from the husband in 1959.[4] North Carolina also has contacts with the agreement: That is the state of Mrs. Cordrey's origin, the state where she lived, caring for her invalid father, at the time of the trial court's decision in this case and the state where she owned a small grocery store.[5]

It bears noting that the parties, despite the fact that they lived in different states when the agreement was executed, did not stipulate that Ohio's law should apply, a choice of law that all courts would give effect to, Goodrich, *supra* § 107.

Choosing the law applicable to the performance of a separation agreement can be a complex and difficult question. It is not, however, a federal question.

IV

If Ohio law were assumed to be controlling, and if appellant's failure to plead and prove it were ignored, there would still remain a serious question whether the application of Ohio law would have produced a different result.[6]

The Ohio statutes relied upon by appellant do not appear germane to the question that was before the trial court. One statute, Section 3103.05 of the Ohio Revised Code, seems merely to remove the common-law disability of spouses to contract with one another:

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[4]The Jurisdictional Statement, p. 15, refers to Pennsylvania as the state "where the contract is [usually] to be performed."

[5]Of course Florida, the residence of the husband-obligor Dr. Cordrey, also has substantial contacts with the agreement.

[6]How the courts of New York would have decided this case if the agreement had been incorporated in a Nevada decree (Jur. St. 16) is of no conceivable pertinence to this issue.

> "A husband or wife may enter into any engagement or transaction with the other . . . which either might if unmarried . . . ."

The other, Section 3103.06, expressly authorizes separation agreements as an exception to the general rule that a husband and a wife may not by contract alter their legal relations with one another.

Appellant cites two Ohio cases construing these statutes. The first, *Burlovic v. Farmer*, 115 N.E.2d 411 (Ohio App. 1953), holds that a husband and wife may enter into a valid separation agreement notwithstanding that the wife is, at the time the agreement is made, an infant. The case is of no conceivable relevance. The other case cited is *Lowman v. Lowman*, 166 Ohio St. 1, 139 N.E.2d 1 (1956). The agreement involved there was a complete mutual release by the husband and the wife of all rights of support, dower, inheritance, etc. The wife sued to have the agreement annulled. The Supreme Court of Ohio held that she had not shown any basis for annullment. The court most assuredly did not hold that a separation agreement that is not a mutual release but instead provides for continuing performance can never be modified by a court.[7]

Thus, the uncertainty over whether the result in this case would have been different if the Florida courts had applied Ohio law makes this case a wholly inappropriate vehicle for resolution of the constitutional claims put forward by appellant. *Cf. Halvey v. Halvey*, 330 U.S. 610, 618-19 (1947) (Frankfurter, J., concurring).

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[7]It might be noted that the Pennsylvania courts also have not said that a court may never modify a separation agreement which provides for continuing payments by the husband no matter how circumstances have changed. In Miller v. Miller, 284 Pa. 414, 418, 131 Atl. 236, 238 (1925), the Supreme Court of Pennsylvania said that "if legally made, *and apparently fair and reasonable*," a separation agreement will be enforced. (Emphasis added.) Under Pennsylvania law there is no alimony after an absolute divorce. Teitelbaum, *The Pennsylvania Divorce Law*, preceding tit. 23, Purdon's Pa. Stat. Ann. (1955).

V.

Should the appeal overcome all of the obstacles stated in the preceding sections of this motion, it should nevertheless be dismissed because the federal questions it purports to present are so unsubstantial as not to deserve plenary consideration by this Court.

A

The alleged constitutional question most strenuously pressed by appellant is based upon the full faith and credit clause.

It is axiomatic that "*prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted." *Aslaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935). A state violates the full faith and credit clause where it applies its own law to a contract only where "there was no occurrence, nothing done, to which the law of . . . [the forum] could apply."[8] *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936); *cf. Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 476 (1947).

Here the Florida courts have applied a Florida statute—which avowedly is "declaratory of existing public policy and laws" of Florida and which courts are enjoined "to construe liberally"—to a controversy between a long-time Floridian and a resident of another state who had invoked the jurisdiction of the Florida courts. There is no doubt that Florida has a legitimate interest in protecting one of its residents against the unconscionable result of a bargain he made under circumstances that have vastly changed and under a kind of duress.

There can be no substantial claim, therefore, that what Florida has done violates the full faith and credit clause.

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[8] Except in cases like Converse v. Hamilton, 224 U.S. 243 (1912), where a state has been required to apply the law of the incorporating state to determine matters of statutory assessment against shareholders of an insolvent corporation.

B

What has just been said also disposes of the only other constitutional claim appellant apparently mentioned in the state court of appeal, *i.e.*, that the judgment below violates the due process clause. (Jur. St. 13-14).[9]

The leading case is *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). There the Court held that a Texas statute that prohibited contractual provisions limiting the time to sue to any period less than two years after breach violated due process when it was applied by Texas courts in a suit on a fire insurance policy against foreign insurers; the reason was that Texas had no connection whatever with the matter save for the fact that suit had been brought in the Texas courts by the party invoking the Texas statute.

Here, of course, it is appellant, the wife, who has invoked the Florida laws and the Florida courts. Here the fact of appellee's residence being in Florida was of considerable significance. It is altogether appropriate for the Florida courts to require, as a condition of judicial enforcement against a Floridian of obligations claimed to have been assumed under a separation agreement, that the reasonableness of the terms of the agreement be subjected to review in light of changed circumstances.

As the Court said in *Dick*,

> "Doubtless, a State may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and, under some circumstances, it may refuse to aid in the enforcement of such rights." 281 U.S. at 410

Here Florida has done much less than what it may constitutionally do. Its actions do not take anyone's property without due process of law.

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[9] Appellant invokes the contract clause here but does not even claim to have mentioned it below.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

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February 1969

APPENDIX

Florida Appellate Rule 2.1

* * *

(5) Jurisdiction of the Supreme Court.

(a) Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees passing directly upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal Constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The Supreme Court may directly review interlocutory orders or decrees passing upon chancery matters which upon final decree would be directly appealable to the Supreme Court. In all direct appeals and interlocutory appeals, the Supreme Court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law.

The Supreme Court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other

agency is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to trial courts when questions are involved upon which a direct appeal to the Supreme Court is allowed as a matter of right.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

CORDREY *v.* CORDREY.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 859. Decided February 24, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.